



CONTRACTOR & GRANTEE WHISTLEBLOWING

OVERVIEW

Employees of entities that contract with, or receive grants from, the federal government—including subcontractors, subgrantees and personal services contractors—can make protected whistleblowing disclosures about misconduct to specific audiences.

- ❖ [10 U.S.C. § 2409](#) applies rights to contractors or grantees of the Department of Defense or National Aeronautics and Space Administration (NASA)
- ❖ [41 U.S.C. § 4712](#) applies rights to most other agencies' contractors and grantees

(Note that these statutes are nearly identical. The language in title ten is merely specific to the Defense Department and NASA.)

Additional relevant processes are explained in the Federal Acquisition Regulation (FAR), the rules that agencies follow when they acquire goods and services from the private sector.

- ❖ [FAR Subpart 3.9](#): Whistleblower Protections for Contractor Employees
- ❖ [FAR 52.203-17](#): Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights

SCOPE OF COVERAGE

The laws cover employees of federal:

- | | |
|---------------------------------|---------------|
| ❖ Contractors | ❖ Grantees |
| ❖ Subcontractors | ❖ Subgrantees |
| ❖ Personal Services Contractors | |

Disclosures related to contracts or grants of any of the [seventeen different intelligence community elements](#) are **not covered** under these protections. [Intelligence community](#) contractor whistleblowers are covered under [50 U.S.C. § 3234](#).

Protected Disclosures

The laws protect disclosures that involve wrongdoing related to federal contracting or grantmaking. Specifically, the laws protect covered employees when they make a disclosure with a **reasonable belief** that the information evidences:

- ❖ Gross mismanagement of a federal contract or grant
- ❖ A gross waste of federal funds
- ❖ An abuse of authority relating to a federal contract or grant
- ❖ A substantial and specific danger to public health or safety
- ❖ A violation of law, rule, or regulation related to a federal contract (including the competition for or negotiation of a contract) or grant

WHISTLEBLOWER RIGHTS SUPERSEDE AGENCY ORDERS RESTRICTING SPEECH

Contractors and grantees cannot gag their employees from making lawful disclosures through policy, order, or agreement. Any kind of restriction on employee speech must contain verbatim the clause in [5 U.S.C. § 2302\(b\)\(13\)](#) that declares the supremacy of whistleblower rights in the event of a conflict. (See: [Pub. L. 116-93 § 743](#)).

Protected Audiences

To be protected, disclosures can be made to any of the following audiences:

- ❖ A Member of Congress or a representative of a committee of Congress
- ❖ An Inspector General
- ❖ The Government Accountability Office
- ❖ A Federal employee responsible for contract or grant oversight or management at the relevant agency involved
- ❖ An authorized official of the Department of Justice or other law enforcement agency
- ❖ A court or grand jury
- ❖ A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct

Note that employees are also protected if they make their disclosures as part of a judicial or administrative proceeding regarding waste, fraud, or abuse of a federal contract or grant.

RELIEF FROM RETALIATION

If a whistleblower believes they are facing unlawful retaliation because of a protected disclosure, they may file a claim with the inspector general (IG) of the agency that awarded the contract or grant. That filing triggers a time-bound administrative process involving an investigation and subsequent decision on the whistleblower's claim. Whistleblowers who do not have a favorable outcome through this administrative process, or do not receive a decision within 210 days, may seek relief in federal district court.

There is a **three-year statute of limitations** from the date of the alleged retaliation for whistleblowers to file their IG claim.

BURDEN OF PROOF

The contractor laws mandate that the relevant IG, agency head, or court, apply the same burden of proof that is applied to employees under the Whistleblower Protection Act ([5 U.S.C. § 1221\(e\)](#)), when determining whether a whistleblower can prevail in their claim.

To prevail in their case, a whistleblower must establish that their whistleblowing was a contributing factor in the personnel action they either experienced or are being threatened with. To do that, the whistleblower must demonstrate by a **preponderance of the evidence** (more likely than not) that:

1. They made a protected disclosure under the law (or managers believed that they did or intended to, even if mistaken)
2. The officials responsible for the challenged personnel action knew of or should have known of the disclosure
3. The officials took, threatened, or failed to take a personnel action following the disclosure
4. There is a causal connection between the disclosure and the personnel action

If the whistleblower meets that burden, the burden then shifts to the employer to prove, by **clear and convincing evidence** (a higher bar) that it had a legitimate reason for ordering the personnel action that was independent of the whistleblowing activity. If the employer satisfies that burden, they win the case and the personnel action stands. If not, the whistleblower prevails.

Inspector General Investigation into the Retaliation Claim

Once an inspector general office receives a whistleblower's retaliation claim, the IG must first determine if the claim is frivolous, if it fails to allege prohibited conduct, or if the issue has been previously addressed through a claim filed by this same whistleblower. If none of these apply, the IG must investigate the alleged retaliation.

- ❖ The IG has **180 days** to make this initial determination and to complete their investigation. This window can be extended by an additional 180 days with the consent of the whistleblower.

When the investigation is complete, the IG sends their report, which may or may not substantiate the whistleblower's claim, to the whistleblower, the contractor or grantee involved, and to the head of the agency.

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CONFIDENTIALITY

Subsection (b)(3) of both laws prohibits an IG from responding to inquiries or otherwise disclosing information received from or about a whistleblower who is alleging retaliation with several notable exceptions:

- ❖ The whistleblower gave their consent
- ❖ The disclosure is in accordance with the Privacy Act
- ❖ The disclosure is required under federal law
- ❖ The disclosure is necessary to conduct the investigation into the alleged retaliation

Determination by the Head of the Agency

Once the head of the agency involved receives the inspector general's report into the alleged retaliation, they (or their designee) **must decide within 30 days** to either grant or deny relief to the whistleblower. (Subsection (c) of both laws).

If the agency denies relief or fails to make a determination in time, the whistleblower can take their claim to federal district court and may request a jury trial.

There is a **two-year statute of limitations** for whistleblowers to exercise this court kick-out option. (Subsection (c)(2)).

AGENCY POWER OVER CONTRACTORS/GRANTEES

Should the agency head grant relief to the whistleblower, the agency must order the contractor or grantee involved to take one or more of the following actions:

- ❖ Abate the retaliatory action(s)
- ❖ Make the whistleblower "whole" through reinstatement, compensatory damages, back pay, and benefits lost
- ❖ Reimburse the whistleblower for costs and expenses associated with their retaliation claim (e.g. attorney's fees)

Should the contractor or grantee fail to follow the order of the agency, the **agency must seek a court's enforcement of its order** by asking the Justice Department to file suit in federal district court. The whistleblower can join as a party to that case or they can seek enforcement of an agency's order on their own. (Subsection (c)(4)).

Separately, the contractor or grantee has a **60-day window** to challenge the agency's order in federal appeals court. (Subsection (c)(5)).

EDUCATION & CONTRACTOR/GRANTEE COMPLIANCE

Both statutes include an education requirement to ensure that contractor or grantee employees know their whistleblowing rights. Subsection (d) of both laws requires agencies to ensure that their contractors and grantees are educating employees about their whistleblowing rights in writing.

Further, the FAR requires that agencies include an explicit provision in most federal contracts, expressly stating that employees of the contracting company have whistleblower rights. (Provision: [52.203-17](#).)

ADDITIONAL RESOURCES

Office of the Whistleblower Ombuds [Whistleblower Resources](#)

[DoD OIG briefing on Defense Department contractor/grantee protections](#)

[Oversight.gov/whistleblowers fact sheet on contractor and grantee protections](#)

[March 2017 GAO Report: Contractor Whistleblower Protections Pilot Program: Improvements Needed to Ensure Effective Implementation](#)